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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 342

ACY LENNON,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

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Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ACY LENNON,
Petitioner, Pro Se.

LEONARD FELDMAN,
64 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

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Argument

The following conclusions reasonably may be drawn from a reading of the Government's opposing brief:

1) The Solicitor General recognizes the issue raised by the Trial Court's charge (Point II: Petitioner's Argument, p. 37) and that it is novel, important, and has not been resolved by this Court:

2) The Government has not met the issue of prejudice raised by the Petitioner. The Petitioner never has, and does not now complain of minor technical errors in the admission of irrelevant testimony; the Petitioner does maintain that an atmosphere of prejudice was created by the Government and converted Petitioner's trial into a political arena on an irrelevant issue and deprived him of a fair trial;

3) The cases cited in the Government's brief have no application to the issues raised by the Petitioner; and

4) There are vital errors of fact in the Government's brief, which serve to invalidate the conclusions drawn by the Government therefrom.

Upon the Petition and after consideration of the Government's brief, it is respectfully submitted that certiorari should be granted for either one or both of the following reasons:

1) The issue raised by the Trial Court's charge as a result of the Government's use of omnibus counts, and the measure of protection to which a defendant is entitled when accused under an omnibus count, are issues of such importance to the fair and impartial administration of criminal justice in our Federal courts as to more than warrant this Court's ruling thereon; and

2) The charge of prejudice made by the Petitioner is so supported by the record as to more than satisfy the conclusion that the standards fixed by this Court for a fair and impartial trial have not been met and that the exercise by this Court of its supervisory powers over the administration of justice in the Federal courts is more than merited.

To the extent that this Reply may be somewhat lengthier than usual, it is respectfully drawn to the Court's attention that such length is caused by the necessity of referring to errors of fact contained in the Government's brief.

POINT I

The question raised on the charge is novel, important, of first impression in this Court and requires this Court's ruling on an issue vital to the fair and impartial administration of justice in the Federal Courts.

The Government's brief implicitly recognizes that the issue raised by Petitioner's Point II is novel and important. That the issue has not been resolved by this Court is clear.

Andres v. United States, 333 U. S. 740 (the only case cited on this point by the Government) did not treat with and is completely inapplicable to the issue raised.

The *Andres* case treated with a trial court's charge where two *related* issues were submitted to a jury. The reasoning of this Court in that case, however, supports Petitioner's contention of error in the Trial Court's charge.

The issue at bar arises on a simple set of facts uncomplicated by collateral factual or legal nuances. The Petitioner was charged in a single count with having been guilty of two unrelated acts.[1] Had he been charged in separate counts, each such count would have been legally

[1] Although the attempt is described in the indictment as the filing of a false return, the items of alleged falsity, i.e., dependents and unreported income, were spelled out in the indictment. Thus, the crime of filing a false return was completely dependent upon the Government being able to prove that the return was false as to unreported income, or dependents, or both.

sufficient and the jury would have had to be charged independently on each such count.

It is Petitioner's position that the fact that the two unrelated acts were combined in a single count should not have been and could not properly be used as a device to deprive him of the protection inherent in a proper charge on each unrelated act.

Contrary to the statement in the Government's brief (page 10), the Petitioner has always questioned the jury's conclusion (A. 210a, 245a).

To the extent that the Government's brief indulges in an *a priori* argument on the issue, the reasoning employed by the Government is demonstrably faulty. Speculation in the Government's brief as to how the jury arrived at its verdict cannot help to determine whether the Trial Court's charge was proper. If the charge was in error then the jury's verdict must fall. It cannot be presumed that the jury ignored the charge in reaching its verdict.

The Petitioner was indicted for wilfully *attempting* to evade income taxes. The methods allegedly employed by Petitioner were spelled out in the indictment as being the unrelated acts of taking improper dependents and failing to report income.

As defined by Section 145(b) the crime consists of "an attempt "in any manner". The words "in any manner" which appear in Section 145(b) do not so broaden the scope of a 145(b) trial as to leave the jury free to act independently of the specific charges in the indictment. Actually the words "in any manner" mean "in some manner" and the manner is as set forth and limited by the indictment.

The Government saw fit to include in each count two separate and unrelated manners of attempt—dependents and unreported income.

The crime of attempting to evade is a particular one of the unrelated manners is not and cannot be established if the 12 jurors are not unanimous on at least that one. It follows, therefore, that the charge of the Trial Court must be such as to ensure so far as possible, that the jury will not indulge in compromises but achieve unanimity on at least one of the methods of attempt.

Not only did the Trial Court fail to specifically charge the requirement of unanimity on at least one of the methods, but, in response to a specific request for instructions from the jury the Trial Court actually encouraged a compromise by specifically instructing the jury that: "It is not necessary to decide on each of the items referred to in the bill of particulars; * * *" (A. 202a). On such a charge the jury might reasonably conclude that if some were agreed on the dependents and the rest on the unreported income, they had satisfied the Trial Court's charge and were compelled to bring in a verdict of guilty as to the entire count.

The question is: Was the charge adequate in the face of the inclusion of two unrelated acts of attempted evasion charged in each count?

The Petitioner raises before this Court a question which affects the administration of justice in criminal trials, and upon which the Court has not been heard. It is respectfully submitted that on this ground alone certiorari should be granted.

POINT II

The factual and legal inadequacy of the Government's answer to the Petitioner's charge of prejudice.

The claim of prejudice arises from the Government's charge that Mr. Kent's payment of $3000 to Tenants Protective Association was income to the Petitioner on which

Petitioner wilfully attempted to evade taxes. Using that charge as its fulcrum, the prosecution proceeded to introduce a vast amount of testimony, all of which concerned itself with Congressman Powell and none of which was relevant to the Government's criminal charge against the Petitioner.

The Government tacitly admits that the entire performance was prejudicial to the Petitioner but asks this Court to overlook the unfairness of Petitioner's trial on the narrow ground that it believed it would connect the Petitioner with Mr. Kent's payment to T. P. A. and that such belief justified its conduct.

The argument offered by the Government is completely unacceptable unless the Government is prepared to state to this Court that it presented its own witnesses without knowing what their testimony would be. If this be so (and it is demonstrably not so) then it is respectfully submitted that the Government tried a criminal charge against the Petitioner without knowing whether it could support such charge.

If, on the other hand, the Government knew what its witnesses' testimony would be, then the Petitioner's charge that the Government intended to and did use his trial to expose Congressman Powell cannot be refuted.

Whichever be the case, Petitioner's conviction must be reversed for prejudice and for unfairness.

If the Government seriously believed that it could connect Petitioner with Mr. Kent's $700 payment to Tenants Protective Association, then the heart of its case would have had to be some testimony by Mr. Kent (who was its own witness) that he intended his payment to Tenants Protective Association to be a payment to Petitioner, or had paid Tenants Protective Association on

behalf of Petitioner and that in either event Petitioner knew that Mr. Kent's payment was income to him. Instead Mr. Kent testified to the contrary (G. 12a-13a).

The Government now attempts to infer that Mr. Kent changed his testimony at the trial from that previously given by him to the Senate and the F. B. I.

Mr. Kent testified at the trial on the Government's direct examination, that his testimony was the same as that he had given the Senate and the F. B. I. (G. 16a-17a). Although the Government had transcripts of his Senate testimony and his F. B. I. testimony, not a single variance was shown or attempted to be shown, nor did the Government see fit to introduce such prior testimony to show any variance. The present effort by the Government to infer that Mr. Kent testified differently at the trial than he had before the Senate or the F. B. I. is unfair and unsupported by the record. The conclusion is inescapable that the Government knew what Mr. Kent's testimony would be (G. 15a).

The Government's alleged effort to connect Petitioner with the $3000 collapsed on Mr. Kent's testimony.[2] Yet, the Government persisted thereafter in calling Messrs. Klein, Jackson, Powell, Ludeke, Bulson and Emanuel and Mrs. Perry, none of whom testified that the money paid by Mr. Kent was income to the Petitioner,[2] but all of whom did testify about Congressman Powell or Tenants Protective Association.

In a further attempt to rationalize its use of the $3000 issue, the Government's brief contains a series of "facts"

[2] The Government went so far as to put Congressman Powell on the stand without even first attempting to ascertain the nature of his testimony (G. 118a). Apparently the Government was more interested in examining Dr. Powell under oath, and was willing to leave to chance the effect of his testimony on its case against Petitioner.

involving a "cashier's check". There never was a cashier's check.[3] As a matter of fact, the record shows the Government's brief to be completely erroneous in this respect.

The Kent check (which was produced as an exhibit, Ex. 42) was made payable to Tenants Protective Association. It was deposited in the Tenants Protective Association's account (G. 67a). The Tenants Protective Association account required two signatures for the withdrawal of funds and Petitioner did not even have the authority to sign as one of such signatures (G. 68a-70a). "The check used to purchase the cashier's check" never existed and there was absolutely no testimony that any such check had been stolen or destroyed. The Tenants Protective Association check which Klein received was a certified check drawn directly on the Tenants Protective Association account (G. 68a, Ex. 16—G. 170a).

Not a single "fact" asserted in the Government's brief on the issue of the "cashier's check" can be found in the record.

In a further attempt to justify the prejudicial testimony, the Government claims that it was Petitioner and Mr. Hampton who made the loan to Mr. Klein. And that the Government was surprised by Mr. Klein's refusal to so testify.

The attempted inference in the Government's brief that the Government was surprised by Mr. Klein's testimony at the trial is unsupported by the record. The record

[3] Petitioner wasn't even an officer of Tenants Protective Association and had no check signing power on the T. P. A. account (G. 68a-70a). Petitioner had received other commissions from Mr. Kent, and to which Mr. Kent testified. However, the Government conceded that there was no claim that Petitioner had concealed such commissions and conceded that they were not involved in the case (G. 9a-11a).

is clear that the Government knew that Mr. Klein had changed his story and knew it six months before the trial (G. 33a-34a). Further, nothing that Mr. Klein had previously testified to before the Grand Jury, or swore to in a statement to the Treasury Department could possibly support a jury conclusion that the $3000 payment to Tenants Protective Association was income to Petitioner which he wilfully concealed in an attempt to evade income taxes (G. 36a-51a, Ex. 14, G-169a).

The Government in its own opening to the jury didn't even suggest that it was Petitioner and Mr. Hampton who personally loaned the money to Mr. Klein. As a matter of fact it was the Government who called Congressman Powell as its own witness to elicit the fact that it was not Petitioner but Dr. Powell who controlled the money and who decided to give it to Mr. Klein (G. 90a-93a).

The only rational conclusion to be drawn from all of the facts is that the Government planned to use Petitioner's trial as a means of publicly dealing with Congressman Powell. The following colloquy is revealing:

> "The Court: * * * However, let me ask you, Mr. Bolan, in connection with all this testimony what is it exactly that you are trying to establish about this $3000?
>
> Mr. Bolan: I am trying to establish whether or not it was Congressman Powell who had control over this $3000 or whether it was the Tenant's Protective Association" (G. 54a).

In an attempt to ameliorate the effect of the prejudice, the Government's brief offers the comment that on two separate occasions the Trial Court instructed the jury to disregard the $3000 *issue*. It is Petitioner's position that such instruction did nothing to overcome the prejudicial

ent to [illegible] testimony. It is Petitioner's former position that the Trial Court never instructed the jury to disregard the [illegible] testimony.

The Government's brief attempts to place the onus for the injection of politics into the trial upon Petitioner. Not only is this claim grossly unfair to Petitioner, who [illegible] a fair trial, it is completely inaccurate.

In its very opening to the jury the Government raised the issue of [illegible] political conduct by tying the [illegible] to Congressman Powell's campaign for reelection. (T. 19-21). When the Government called Mr. Ford as its very first witness, the prosecutor irrelevantly and unnecessarily asked him on direct examination:

"Q. Now, you ceased doing business with the Abyssinian Baptist Church in 1951, is that right.

A. August 1951.

Q. And what was the reason for the termination of your business? A. Congressman Powell and myself had a disagreement politically. We disagreed politically." (T. 39, see also T. 68).

It is clear beyond question that on every occasion, it was the Government who first injected politics into the trial.

It follows from the foregoing that Petitioner has established the following reasons for a grant of certiorari on this issue of prejudice:

1) The Government knew that it would not show any connection between the Petitioner and the Kent [illegible]

2) The Government deliberately embarked on the [illegible] course;

[illegible] Powell is [illegible] Point I in Petitioner's main argument

(3) All of the testimony regarding the $7000 was irrelevant insofar as a charge of willful evasion of tax by the Petitioner was concerned; and

(4) The introduction of the testimony coupled with the political slant of the testimony was so inflammatory and prejudicial as to deprive Petitioner of a fair trial.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Abe Lenson,
Petitioner Pro Se

Leonard Feldman,
Of Counsel